

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CYNTHIA MILLER)	
Claimant)	
VS.)	
)	Docket No. 211,557
TOTAL PETROLEUM, INC.)	
Respondent)	
AND)	
)	
HARTFORD ACCIDENT & INDEMNITY)	
Insurance Carrier)	

ORDER

The application of respondent for review of the Award of Administrative Law Judge John D. Clark dated July 21, 1997, came on for review by the Workers Compensation Appeals Board.

APPEARANCES

Claimant appeared by and through her attorney, Gary A. Winfrey of Wichita, Kansas. Respondent and its insurance carrier appeared by and through their attorney, Robert G. Martin of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

- (1) What is the nature and extent of claimant's injury and/or disability?

- (2) Is claimant entitled to additional temporary total disability compensation during work hardening?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

The Appeals Board finds that the Award of the Administrative Law Judge sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The findings and conclusions enumerated in the Award of the Administrative Law Judge are accurate and appropriate, and the Appeals Board adopts the same as its own findings and conclusions as if specifically set forth herein.

The parties agree claimant suffered accidental injury arising out of and in the course of her employment on January 2, 1994, while moving shelves at respondent's store where she was the manager. After a period of treatment claimant was assessed an eight percent functional impairment by Lawrence R. Blaty, M.D., and returned to an accommodated position with respondent. In June 1995, claimant was laid off by respondent amid allegations that claimant suffered from a bad attitude and provided poor management. Respondent provided no support for these allegations leading to claimant's termination of employment. Claimant presented a multi-year employment history with respondent with no prior indications of a bad attitude or poor management. Claimant consistently received good job reviews, had good rapport with her employees, received a raise and bonus in October, 1994, and was never advised, prior to the termination, of any problems with her attitude or job performance. Respondent contends claimant should be limited to her functional impairment and cites Perez v. IBP, Inc., 16 Kan. App. 2d 277, 826 P.2d 520 (1991) as support for its position.

Claimant argues work disability would be in order, asserting that the limitations set forth in Perez would not apply to this factual circumstance. The Administrative Law Judge agreed with claimant's contention. In Perez claimant was terminated from his employment as a result of poor attendance after being returned to work by respondent. In this instance, the allegations made against claimant are not supported by the record. Instead, it appears as though claimant had a good work history with respondent and the termination of employment, amid the allegations of bad attitude and poor management, appear to be a smoke screen created by respondent to justify the termination and avoid a work disability assessment. The Appeals Board rejects respondent's contentions and finds claimant is entitled to a work disability.

In reviewing the uncontradicted medical report of Dr. Blaty, the Appeals Board finds the assessment of an eight percent whole body functional impairment, during the period of time when claimant was employed with respondent and earning a comparable wage, is supported by the credible evidence in the record. In addition, the Administrative Law Judge, in reviewing Dr. Blaty's assessment of claimant's ability to perform work tasks over her past fifteen-year work history, adjusted Dr. Blaty's opinion to eliminate duplicative tasks considered by Dr. Blaty. The Administrative Law Judge then found claimant to have a 47

percent loss of task performing ability which is supported by the credible evidence and is affirmed.

K.S.A. 44-510e obligates the Appeals Board to consider not only the loss of ability to perform work tasks suffered by claimant, but also the difference between the average weekly wage claimant was earning at the time of the injury and the average weekly wage claimant "is earning" after the injury. Here, claimant has returned to work at a part-time position earning \$6.00 per hour working 20 hours per week. This represents an average weekly wage of \$120.00 per week which claimant "is earning". Claimant's uncontradicted testimony is that she has returned to work part-time because the job she is working is not available full-time. Claimant also testified that she has attempted to find full-time work but has, thus far, been unsuccessful. There is no evidence in the file to indicate that claimant has not proceeded in good faith in attempting to locate a full-time position and, as such, no additional wage will be imputed to claimant beyond that which she is currently earning.

When compared to claimant's \$619.19 average weekly wage, claimant's current earnings of \$120.00 per week equate to a wage loss of 81 percent. The Administrative Law Judge, in comparing claimant's 81 percent loss of wages with claimant's 47 percent loss of task performing abilities, awarded claimant a 64 percent permanent partial disability from the time she was terminated from her employment with respondent on June 1, 1995. This finding is supported by the credible evidence and affirmed by the Appeals Board.

In addition, claimant alleges entitlement to temporary total disability compensation during a period of work hardening. This temporary total disability compensation was ordered by the Administrative Law Judge. The medical report of Dr. Blaty indicates claimant was advised to be off work during this period of time and the award of temporary total disability compensation is found to be appropriate, and is affirmed by the Appeals Board.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark, dated July 21, 1997, should be, and is hereby affirmed.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Cynthia Miller, and against the respondent, Total Petroleum, Inc., and its insurance carrier, ITT Hartford, for an accidental injury suffered on about January 2, 1994.

Claimant is entitled to 5.14 weeks temporary total disability compensation at the rate of \$313.00 per week in the amount of \$1,608.82 followed by 33.2 weeks permanent partial disability compensation at the rate of \$313.00 per week in the amount of \$10,391.60 for an 8% permanent partial general body disability followed thereafter by 232.4 weeks permanent partial disability compensation at the rate of \$313.00 per week in the amount of \$72,741.20 for a 64% permanent partial general body disability, making a total award of \$84,741.62.

As of October 13, 1997, there would be due and owing to claimant 5.14 weeks temporary total disability compensation at the rate of \$313.00 per week in the sum of \$1,608.82, followed thereafter by 192.00 weeks permanent partial disability compensation at the rate of \$313.00 per week in the sum of \$60,096.00 for a total of \$61,704.82, which is ordered paid in one lump sum less any amounts previously paid. Thereafter the remaining balance of \$23,036.80 shall be paid for 73.60 weeks at the rate of \$313.00 per week, until fully paid or further order of the Director.

Any fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against respondent and its insurance carrier to be paid as follows:

Deposition Services	
Discovery Deposition of Cynthia Miller	\$331.20
Deposition of Lawrence R. Blaty	\$232.90
Ireland Court Reporting	
Transcript of Preliminary Hearing	\$117.60
Barber & Associates	
Transcript of Regular Hearing	\$176.50

IT IS SO ORDERED.

Dated this ____ day of October 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Gary A. Winfrey, Wichita, KS
Robert G. Martin, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director